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UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

NANCY WILSON, Regional Director of the Sixth Region of the NATIONAL LABOR RELATIONS BOARD, for and on behalf of the NATIONAL LABOR RELATIONS BOARD,

Petitioner Case 4:20-cv-00524-MWB

JERSEY SHORE STEEL CO.

Respondent

PETITIONER'S REPLY TO RESPONDENT'S RESPONSE TO PETITIONER'S PETITION FOR INJUNCTIVE RELIEF UNDER SECTION 10(j) OF THE NATIONAL LABOR RELATIONS ACT

COMES NOW Petitioner Nancy Wilson, Regional Director of the Sixth Region of the National Labor Relations Board, for and on behalf of the National Labor Relations Board ("Petitioner"), and files this Reply to the Response filed in

this matter by Jersey Shore Steel Co. ("Respondent") on April 17, 2020 (Docket No. 35) ("Respondent's Response").

In its Response[1], Respondent seeks "limited and expedited discovery", and requests that the Court hold an evidentiary hearing in this matter. As argued more fully in Petitioner's Memorandum of Points and Authorities (Docket No. 6) ("Petitioner's Memorandum"), as supplemented below, Petitioner submits that Court has sufficient evidence to support the issuance of the requested injunctive relief, and that the discovery and hearing requested by Respondent are not warranted and would only cause detrimental delay.

I. Neither a Hearing, nor Discovery, is Necessary in These Proceedings.

Respondent has in its possession the evidence Petitioner is relying upon to support the need for an injunction. This evidence, submitted to the Court, supports finding there is reasonable cause to believe that the Act has been violated and that an injunction is just and proper. Therefore, a hearing is not necessary to ensure due process.

While the underlying administrative proceeding may present complex issues for decision by an administrative law judge, the issues presented to this Court are

[1] In its Response, Respondent requests that the Court grant a stay of proceedings so that it may be allowed to engage in discovery. Respondent has not responded to the legal arguments presented by Petitioner in support of its request for injunctive relief.

straightforward. As explained more fully in Petitioner's Memorandum, to resolve a request for injunctive relief under Section 10(j) of the National Labor Relations Act (the Act), a district court in the Third Circuit considers two issues: whether there is "reasonable cause to believe" that a respondent has violated the Act, and whether temporary injunctive relief is "just and proper."[2]

Respondent has had ample time to develop its defense and respond to the issues which support this request for injunctive relief. The case upon which this request for injunctive relief is based concerns allegedly unlawful actions taken by Respondent from approximately December 2018 through September 2019. While these allegations span two calendar years, it is disingenuous for Respondent to claim that the allegedly unlawful conduct in this matter spans "two years". (Respondent's Response, p. 4)

The first unfair labor practice charge in this matter was filed in February 2019, and Petitioner diligently investigated that charge, as well as several subsequent charges, as they were filed. Respondent was timely provided with information regarding the specific allegations contained in each charge, and was given ample opportunity to present evidence and argument in response to those

[2] See, e.g., *Chester v. Grane Healthcare,* 666 F.3d 87, 100 (3rd Cir. 2011); *Hirsch v. Dorsey Trailers, Inc*., 147 F.3d 243, 247 (3rd Cir. 1998); *Pascarell v. Vibra Screw Inc*., 904 F.2d 874, 877 (3rd Cir. 1990); *Kobell v. Suburban Lines, Inc*., 731 F.2d 1076, 1078 (3rd Cir. 1984).

allegations. Petitioner made determinations regarding the merits of each of the charges as the investigations concluded.

It was not until Respondent withdrew recognition from United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 4907-04, (the "Union") as the exclusive collective-bargaining representative of the bargaining unit employees that Respondent's unlawful conduct became sufficiently grave to warrant seeking injunctive relief. Prior to the withdrawal of recognition, the three employees who were discharged continued in their roles as members of the Union's bargaining committee and participated in negotiations for the successor collective bargaining agreement. Thus, Respondent's suggestion that Petitioner has been "actively gathering evidence" to support the instant petition for "over a year" (Respondent's Response, p. 6) is misleading.

Petitioner conducted a thorough investigation into the withdrawal of recognition, and, again, provided to Respondent the opportunity to present evidence in support of its position, as well as argument as to the propriety of injunctive relief. Upon completion of that investigation, Petitioner determined that injunctive relief was compelled by the evidence. Petitioner then sought, and obtained, authorization from the National Labor Relations Board ("the Board") to

seek injunctive relief in this matter. Once authorized, Petitioner promptly filed the instant Petition and support.

Affidavits obtained during the course of the investigations of the unfair labor practice charges underlying this matter, which form the basis for Petitioner's determination that injunctive relief is warranted, were submitted to the Court along with the Petitioner's Memorandum.[3] (Docket Nos. 6-2, 6-3) This Court need only determine whether the evidence contained in these sworn statements[4], along with the other evidence presented to the Court, show that Petitioner has reasonable

[3] Respondent baldly suggests that there are "untold" numbers of affidavits that were not submitted to the Court. (Respondent's Response, p. 6) Petitioner submitted to the Court the affidavits which support Petitioner's request for injunctive relief, and show, as required, that Petitioner has reasonable cause to believe that Respondent has violated the Act, and that the relief sought is just and proper. Respondent's speculation as to the number, or contents, of any other affidavits is irrelevant.

[4] While Respondent pointed out minor discrepancies in the testimony of witnesses regarding the date on which an employee meeting was held in February 2019 (Respondent's Response, pp. 8-9), Petitioner notes, as described more fully above, that it is not for the Court to make credibility determinations when determining whether injunctive relief is warranted. Regardless, slight inconsistencies in witness recollection do not render the testimony invalid. "Uncertain, incorrect, or inconsistent testimony regarding dates is common and frequently discounted in evaluating witness credibility, particularly where the date would not have had any particular importance to the witness at the time." *Pacific Green Trucking Inc.*, 368 NLRB No. 14, slip op. p. 5, n. 13 (June 27, 2019) (citations omitted). Separately, Petitioner notes that Respondent does not dispute that the event described in the referenced affidavits occurred; it merely argues that it was lawful.

cause to believe that the Act has been violated, and that the relief sought is just and proper. The Court does not have the authority to make credibility determinations.[5]

As stated in Petitioner's Memorandum, it is well settled that district courts, in proceedings under Section 10(j), do not decide the merits of the case, and the Regional Director need not prove the ultimate violations.[6] Indeed, it is settled that in these preliminary proceedings, the District Court should give the Regional Director's version of the disputed facts the "benefit of the doubt," and should accept the reasonable inferences the Regional Director draws therefrom if they are "within the range of rationality".[7] The reasonable cause standard imposes a "low

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[5] *See Ahearn v. Jackson Hospital Corp*., 351 F.3d 226, 234 (6th Cir. 2003). *Accord*: *Fuchs v. Jet Spray Corp.*, 560 F. Supp. 1147, 1150-51 n. 2 (D. Mass. 1983), *aff'd. per curiam* 725 F.2d 664 (1st Cir. 1983).

[6] See *Kobell v. Suburban Lines*, *Inc.*, 731 F.2d at 1083-1084. See also *Chester v. Grane Healthcare*, 666 F.3d at 100 ("it is not [the court's] role to adjudicate the merits of the underlying claim"); *Eisenberg v. Wellington Hall Nursing Home, Inc*., 651 F.2d 902, 906 (3rd Cir. 1981) (holding it improper for district court to pass upon ultimate issue of alleged proscribed employer motivation for discharges).

[7] *Kobell v. Suburban Lines, Inc.*, 731 F.2d at 1084; *Seeler v. The Trading Port, Inc.*, 517 F.2d 33, 36-37 (2nd Cir. 1975). Accord, *Maram v. Universidad Interamericana*, 722 F.2d 953, 958-959 (1st Cir. 1983); *Kaynard v. Palby Lingerie, Inc.*, 625 F.2d 1047, 1051 (2nd Cir. 1980); *Levine v. C & W Mining Co., Inc.*, 610 F.2d 432, 435 (6th Cir. 1979); *Arlook v. S. Lichtenberg & Co.*, 952 F.2d 367, 371-372 (11th Cir. 1992).

threshold of proof" on the Regional Director.[8] This standard is satisfied as long as: 1) the Regional Director's legal theory is "substantial and not frivolous"; and 2) viewing contested factual issues favorably to the Board, sufficient evidence supports that theory.[9] In making this examination, the district court should not attempt to resolve issues of credibility of witnesses.[10]

In view of Petitioner's "relatively insubstantial burden of proof," it is not necessary for a District Court to hold a full evidentiary hearing to enable it to conclude whether "reasonable cause" has been established.[11] The weight of judicial authority holds that it is proper for a District Court to base its "reasonable cause" determination in Section 10(j) cases upon evidence presented in the form of affidavits or the transcript of a Board hearing before an administrative law judge.[12]

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[8] *See Eisenberg v. Wellington Hall Nursing Home*, 651 F.2d at 905; *Kobell v. Suburban Lines, Inc.*, 731 F.2d at 1084.

[9] *Chester v. Grane Healthcare Co*., 666 F.3d at 100, citing *Pascarell v. Vibra Screw Inc.*, 904 F.2d at 882.

[10] *See Ahearn v. Jackson Hospital Corp*., 351 F.3d at 234. *Accord*: *Fuchs v. Jet Spray Corp.*, 560 F. Supp. at 1150-51 n. 2.

[11] *Gottfried v. Frankel,* 818 F.2d 485, 493-94 (6th Cir. 1987); *Kobell v. Suburban Lines, Inc.*, 731 F.2d at 1084.

[12] *Sharp v. Webco Industries, Inc.*, 225 F.3d 1130, 1134 (10th Cir. 2000); accord, *Gottfried v. Frankel,* 818 F.2d at 493 (finding the District Court did not commit reversible error by denying an evidentiary hearing and relying upon a combination of affidavits and transcript of the hearing before an ALJ); *San Francisco-Oakland Newspaper Guild v. Kennedy,* 412 F.2d 541, 546 (9th Cir. 1969) (affidavits);

In light of this precedent, it is not "radical", as Respondent suggests (Respondent's Response, pp. 6-7), for the Court to base an order for injunctive relief upon the evidence submitted by Petitioner.

Based on the foregoing, granting Respondent's request for discovery would only cause detrimental delay.[13] The statements which support Petitioner's request for injunctive relief have been provided to Respondent as part of Petitioner's filings with this Court.[14] As noted, Petitioner need only show that it had

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Kennedy v. Teamsters Local 542, 443 F.2d 627, 630 (9th Cir. 1971) (same); *Squillacote v. Automobile Workers,* 383 F. Supp. 491, 493 (E.D. Wis. 1974) (same).

[13] Respondent vaguely represents in its Response that it is seeking "limited and expedited discovery." (Respondent's Response, p. 13) While Respondent requests "limited" discovery, no limitations are suggested. It is not clear what information Respondent seeks to obtain regarding the statements gathered by Petitioner during the underlying investigation that would be relevant to the determination that this Court must make. For instance, Respondent requests the opportunity to "subpoena relevant documents from third parties" (Respondent's Response, p. 13), without providing any specificity as to what documents might be relevant, or the identity of referenced "third parties".

[14] Respondent notes that there are references in the submitted affidavits to documents which were provided to the Board by the affiants. (Respondent's Response, p. 13, n. 7) A review of the affidavits reveals that virtually all of the referenced documents are already in Respondent's possession, obviating the need for any discovery. For example, in the affidavit of Michael Lapsansky (Petitioner's Memorandum, Docket No. 6-2, Exhibit F), referenced documents include correspondence with Respondent, contract proposals submitted to Respondent, and a grievance filed with Respondent; and the affidavit of Employee J (Petitioner's Memorandum, Docket No. 6-3, Exhibit J) referenced a document

"reasonable cause" to believe that the Act was violated, and the evidence presented to this Court amply meets that standard.

Neither Rule 43(e) nor Rule 65 of the Federal Rules of Civil Procedure requires oral testimony in this type of statutory, temporary injunction proceeding[15], and proceeding on the basis of affidavits does not deny a fair hearing or due process to Respondent. Using the affidavits submitted by Petitioner in support of its request for injunctive relief will avoid the detrimental delay inherent in scheduling and conducting a full evidentiary hearing or engaging in discovery, particularly in light of the current pandemic. It will avoid duplicative litigation, facilitate a speedy decision, and conserve the time and resources of the Court and the parties that have been greatly diminished by current events. Such procedure fully comports with the statutory priority that should be given to this proceeding under 28 U.S.C. Sec. 1657, and is consistent with the original intent of the 1947 Congress that enacted Section 10(j) of the Act. See *Legislative History LMRA 1947*, 414, 433 (Government Printing Office 1985).

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provided by Respondent to its employees, and a photograph of postings in Respondent's facility.

[15] *Kennedy v. Sheet Metal Workers*, 289 F. Supp. 65, 87-91 (C.D. Cal. 1968). There is nothing in the text of Section 10(j) mandating oral testimony in these proceedings. See *San Francisco-Oakland Newspaper Guild v. Kennedy*, 412 F.2d at 546.

II. Petitioner's Showing that the Requested Relief is Just and Proper has not been Challenged.

Before issuing injunctive relief, the Court determines not only that Petitioner has shown that it has "reasonable cause" to believe that Respondent violated the Act, but also that the requested relief is " just and proper."[16] Respondent seeks discovery and a hearing on the evidence Petitioner presented in support of the "reasonable cause to believe" portion of the standard for issuing injunctive relief. No such request has been made in connection with Petitioner's burden of showing that the requested relief is "just and proper."

Nevertheless, Petitioner submits that the just and proper determination does not rest on disputed facts. Rather, the finding that Respondent's unfair labor practices have unlawfully undermined and evicted the Union turns on the reasonable inference drawn from the nature of the violations, supported by the submitted affidavits and evidence. The evidence on the issue is not in conflict;

[16] In its Response, Respondent cites *Kaynard v. Independent Assoc. of Steel Fabricators, Inc.*, Case No. 76-C-1139, 1976 U.S. Dist. LEXIS 11923 (E.D.N.Y. Dec. 9, 1976), without explaining the appropriate legal context for the language quoted. (Respondent's Reply, p. 8) The court in that case correctly sets forth the standards for injunctive relief. The court states that showing the likelihood of success before the National Labor Relations Board, on its own, does not render injunctive relief appropriate. A court must also consider the "justice and propriety of injunctive relief." *Kaynard v. Independent Assoc. of Steel Fabricators, Inc.*, at *17. Both of these standards must be met before an injunction is issued, and, as described more fully above, both have been met in the case herein.

rather, the inferences to be drawn are in conflict. As noted, Respondent has not requested a hearing or discovery on this issue; additional testimony is unnecessary.

Respondent notes that the Court's operation has been greatly restricted by the unusual circumstances presented by the coronavirus pandemic. Fortunately, as fully explained by the Petitioner, a hearing is not necessary in this case[17], and the pandemic need not cause a delay in these proceedings.

III. Conclusion

Petitioner does not, as Respondent suggests, seek to "alter the legal relationship between the Parties". (Respondent's Response, p. 8) Instead, Petitioner seeks temporary injunctive relief, during the pendency of the underlying litigation, to *restore* the relationship to that which existed before Respondent unlawfully discharged the three members of the Union's bargaining committee and withdrew recognition of the Union as the exclusive collective-bargaining representative of the employees in the bargaining unit. This is the purpose of Section 10(j) of the Act.

[17] Respondent argues that Petitioner requested that Respondent "appear" before the Court (Respondent's Response, p. 11), and that Petitioner thereby requested a hearing in this matter. Petitioner notes that an appearance before a Court need not be a physical appearance, but may also be accomplished by filing an appearance and presenting argument, as Respondent has done herein.

As demonstrated, the submission of this Petition for Injunction, supported by affidavits and evidence, avoids the delay inherent in scheduling and conducting a full hearing, avoids duplicative litigation, conserves the time and resources of the Court and the parties, and is consistent with Third Circuit law. Under these circumstances, Petitioner requests that the Court grant injunctive relief and deny Respondent's request for discovery and a hearing.

As discussed in more detail in Petitioner's Memorandum, without timely interim relief, Respondent's overall bad-faith bargaining, withdrawal of recognition, and discharge of the Union bargaining committee members will undermine employees' support for the Union and deprive employees of the benefits of collective bargaining. Over time, without an immediate injunction requiring interim recognition, good-faith bargaining, and reinstatement of the bargaining committee members, these harms will be irreparable, and the Board's final remedial order will be ineffective. Respondent will succeed in permanently evicting the Union and depriving its employees of representation by the Union through its illegal conduct, contrary to the mission of the Act.

In sum, Petitioner again respectfully requests that this Court grant the relief requested in the Petition for Injunction, and that the Court deny Respondent's

request to delay these proceedings, and for "limited discovery" and a hearing in this matter.

Respectfully Submitted,

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NANCY WILSON, Regional Director of the Sixth Region of the NATIONAL LABOR RELATIONS BOARD, for and on behalf of the NATIONAL LABOR RELATIONS BOARD, Petitioner v. JERSEY SHORE STEEL CO. Respondent	Case 4:20-cv-00524-MWB

CERTIFICATE OF SERVICE

I hereby certify that on April 28, 2020, I electronically filed Petitioner's Reply to Respondent's Response to Petitioner's Petition for Injunctive Relief Under Section 10(j) of the National Labor Relations Act on the CM/ECF system, which will serve notice of the following counsel electronically:

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